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No. 00-1016

IN THE

Supreme Court of the United States

ALLIED PILOTS ASSOCIATION,
RICHARD T. LAVOY,

AND

BRYAN A. MAYHEW,

Petitioners,

v.

AMERICAN AIRLINES, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

RICHARD A. MALAHOWSKI
AMERICAN AIRLINES, INC.,
Legal Department, MD 5675
P.O. Box 619616
D/FW Airport, Texas 75261-9616

HARRY A. RISSETTO
MORGAN, LEWIS & BOCKIUS LLP
1800 M Street, N.W.
Washington, D.C. 20036

DEE J. KELLY
Counsel of Record
DONALD E. HERRMANN
ROGER C. DISEKER
KELLY, HART & HALLMAN, P.C.
201 Main Street, Suite 2500
Fort Worth, Texas 76102
(817) 332-2500

Counsel for Respondent American Airlines, Inc.

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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QUESTION PRESENTED

Whether the district court provided adequate notice and opportunity to petitioners to be heard on the questions of liability and compensatory damages for premeditated civil contempt of the district court's order requiring the petitioner Allied Pilots Association to take all reasonable steps to end an illegal sick-out by members of the Association.

RULE 29.6 STATEMENT

Respondent American Airlines, Inc. is a wholly owned corporate subsidiary of AMR Corp. Neither American Airlines, Inc. nor AMR Corp. has any non-wholly owned, publicly-traded subsidiaries.

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BRIEF IN OPPOSITION

The respondent, American Airlines, Inc., submits this brief in opposition to the petition for a writ of certiorari in this case.

RESTATEMENT OF THE CASE

Petitioners' recitation of the factual and procedural history of this case is inadequate. They received far more due process than they profess in their Petition, and much more than the exigencies of the case legally required. It is difficult to imagine a case where there has been a more premeditated effort to defy and circumvent a federal court order. Contrary to what the Association says, the district court issued a straightforward TRO requiring the Association to disengage from an illegal sick-out and return to work immediately. The President of the Association initially misrepresented the

Association's sponsorship of the sick-out to the trial court, only later to have the Association's counsel recant when confronted by irrefutable evidence of the Association's misconduct. At the time of the TRO hearing, American produced internal Association e-mails describing how the Association membership could evade any TRO the court might issue. If not for the timely intervention of the district court, the Association would have succeeded in its lawless effort to disable American and to maintain a prolonged disruption of the nation's transportation system.

A. Restatement Of The Nature Of The Proceedings Below

This case arises out of contempt proceedings to halt premeditated, concerted and temporarily successful defiance of a federal court order. On February 10, 1999, American obtained a temporary restraining order against its pilots' Association (the "APA"), together with the APA's President ("LaVoy"), Vice President ("Mayhew"), and Board of Directors under the Railway Labor Act, 45 U.S.C. § 151, *et seq.* ("RLA"), to halt the APA's illegal sick-out against American. The sick-out caused American to cancel thousands of flights, stranding hundreds of thousands of passengers and costing the Company over $250 million. The TRO was issued fully in accord with the Federal Rules of Civil Procedure. When it became apparent that the district court would enjoin the sick-out, LaVoy assured the court that the Association would obey the order. APA counsel then assisted in drafting the TRO. The sick-out actually worsened *after* the TRO was entered.

American sought on February 11, 1999, and the district court convened on February 12, a show cause hearing where petitioners appeared and presented their defense to the short and plain allegation of contempt. In all, nine members of the

APA leadership appeared, including LaVoy and Mayhew.[1] The district court conducted a full-day evidentiary hearing on February 12, 1999, at which ten witnesses (including LaVoy and Mayhew) testified. The defendants cross-examined four of the witnesses and passed the opportunity to examine six others. American and APA introduced four and three exhibits, respectively. American had already attached to its TRO papers three Association e-mails detailing how the Association membership could evade any TRO issued by the Court. The district court then adjourned to consider fully the evidence before preparing the findings of fact and conclusions of law that it issued the following day.

In its findings, the district court carefully weighed the evidence and declined to hold several individual defendants, who testified, in contempt, while making a contempt finding against LaVoy, Mayhew and the APA. The district court also deferred any finding with respect to numerous individual defendants who did not appear. The district court then held a damages hearing on February 17, 1999, where it heard the direct and cross-examination of American's two damages experts and admitted ten exhibits. At petitioners' request, the proceedings were continued for two months to permit them to conduct extensive document discovery—in response to which American produced more than 12,000 pages of documents, boxes of microfiche records and a zip disk of computer data—and to prepare their own expert witnesses. The district court reconvened in April 1999 for two days of testimony, during which APA had a second opportunity, after weeks of studying the underlying data, to examine American's damages witnesses.

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[1] Also present were: APA Treasurer Robert Morgan, DFW Domicile Chair and Vice Chair Norm Patterson and Larry Foster, and the National Negotiating Committee: Michael Mellerski, John Darrah, Leonard Turcotte, and Kent Michaelson.

On June 23, 1999, the district court entered a Judgment Awarding Compensatory Damages for Civil Contempt and a Memorandum Opinion (Containing Findings of Fact and Conclusions of Law) and Contempt and Damage Order. (Pet. App. 39a) The court found that during the period of Petitioners' contempt, American suffered $45.5 million in direct damages from the contempt and that LaVoy and Mayhew were jointly and severally liable with the APA for failing to use their best efforts to halt the sick-out that they instigated. (Pet. App. 12a) In the court of appeals, petitioners did not contest the amount of compensatory damages awarded by the trial court.

B. Restatement Of Relevant Facts

Even in the context of contentious labor disputes, this is an extraordinary example of a union's efforts to defy a court order—an order that it knew would be issued—to end what it knew was an illegal job action. Despite the illegality of its actions, the APA nonetheless knowingly instructed its members to ignore any court-ordered return to work.[2]

1. The APA Organized The Sick-Out And Advised Its Members To Defy Any Injunction

The APA relied on e-mail and an aggressive phone tree to organize the sick-out.[3] In addition to directing its members to

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[2] Petitioners possibly gambled that they would face only coercive fines that could be purged by compliance, allowing the Association to strike a crippling blow to American without sustaining any damage to itself. *See* App. 57a (APA Board Member Foster admitting sick-out was organized "for the express purpose of economically damaging American Airlines 'to get [American] off the dime.'").

[3] The leadership of the APA consists of a President, Vice President, and Board of Directors, which is comprised of representatives from American's hubs, including San Francisco, Los Angeles, Chicago, New York, Miami and Dallas–Fort Worth. The APA maintains a comprehensive communications network with rank-and-file members. It delivers

call in sick, the APA advised pilots to defy any back-to-work injunction. The Association's efforts to pre-condition its members to defy a back-to-work order are a cornerstone of the opinion of the court of appeals. On February 5, 1999, an APA director sent the following e-mail (the three e-mails referenced are attached in an appendix) to the Los Angeles-based pilots, advising them that:

> It is possible that a Federal Judge will enjoin the APA from an alleged illegal job action. If that happens it does NOT mean that you, as an individual, may return to work if you still feel too stressed to perform safely in the cockpit. Remember the FAA has given YOU the final determination whether or not you are fit for flying duty.

(Resp. App. 6a) This campaign to defy any court order was Association-wide. Dallas-based pilots were likewise warned to ignore any injunctions:

> THINGS TO CONSIDER: It is possible that management will file an injunction against APA. That does not mean that you must fly if you are "sick."

(Resp. App. 3a)

Against this backdrop of premeditated contempt, the APA organized its illegal sick-out. Miami-based pilots were advised that:

> Today, February 5, 1999, is the "line in the sand."
>
> * * *
>
> We can no longer ask you to withhold expressing your indignation at AMR's failure to respect your contractual rights.

"blast" e-mails to its pilots, maintains an internet web-site where it posts communications, operates a toll-free "hotline" to make recorded messages available, and houses facilities where APA volunteers operate phone trees (placing outgoing calls) and phone watches (accepting incoming calls). Each domicile has similar communications capability.

* * *

> Hopefully, your resolute actions will bring this odious situation to an end.

(Resp. App. 1a)

In a similar vein, Dallas-based pilots were told that the Association needed to send a signal to American:

> There has been a great deal of stress associated with these actions by management. We are all feeling its ill effect and, in the absence of an adequate remedy, APA leadership is asking all pilots system-wide to consider whether they are 100% capable of performing their duties in the cockpit. Remember, self-assessment of your physical and mental well-being is your obligation under Federal Law. If you find yourself unable to perform your duties, you should consider your contractually available options—prior to your next scheduled trip.[4]

(Resp. App. 2a)

Los Angeles pilots were instructed to place themselves on the sick list and to encourage other pilots to do so:

> APA leadership is asking pilots SYSTEM-WIDE, to assess whether they are at 100% capacity to perform their professional duties in the cockpit. If you find yourself unable to perform your duties at 100% you should consider calling in sick.
>
> * * *
>
> If you decide that you are unfit to fly your next trip, and MOST pilots probably are, then you should contact crew schedule immediately to let them know you are SICK.

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[4] The message continued: "Your Union needs your help to convince management of our collective resolve . . . . Sick is defined by Webster as: sick: a) affected by disease b) spiritually unsound c) sickened by strong emotion d) depressed e) lacking vigor. Do you meet this definition? If so, avail yourself of your negotiated rights." (Resp. App. 3a-4a)

* * *

> Fellow LAX pilots, we are asking each of you to assist in spreading the word. When you receive this message, please consult your hard-copy Domicile Roster and make an effort to personally speak to at least three pilots above and below you.
>
> * * *
>
> The Domicile Telephone Committee will be looking for help. If contacted, please assist. It is a small investment for our contract and our careers.

(Resp. App. 5a-7a)

The sick-out began as scheduled on February 5, 1999. The APA Board of Directors led by example, with twelve of 16 members calling in sick. American cancelled five flights on February 5 because of the sick-out. On February 6, cancellations rose to 84 and then to 246 on February 7.

Still unsatisfied, LaVoy rallied the troops with a Hotline message on February 7:

> First, there's been a dramatic increase in the reassignment of pilots on days off, as getting pilots into the cockpit by any means has become the only alternative to canceling flights. With that said, line holders keep in mind that our contract does not obligate pilots to be available to answer or return phone calls on days off . . . Second, another unfortunate aspect of this ongoing pilot shortage is management pressuring pilots into flying when the pilots have deemed themselves not physically fit to fly. We simply cannot allow anyone to pressure us into flying when we are not medically fit because it would be a serious violation of Federal Air Regulations . . .

(R. 67-70)

These communications, all of which American submitted to the district court with its TRO papers on February 9, 1999, reveal the APA's premeditated strategy to stage an illegal

job-action and commit contempt if enjoined.[5] The strategy succeeded. On February 8, American cancelled 505 flights. On February 9, American cancelled 827 flights, bringing the total cancellations at that time to 1,662. Facing these cancellations and the prospect of mounting disruptions to its operations, American went to the district court on February 10, 1999.

Despite his knowledge of and complicity in the Association's organized sick-out, LaVoy represented to the district court at the February 10 TRO hearing that the APA had little to do with the sick-out and that it was a "truly . . . spontaneous," "grassroots" action by the pilots. [Feb. 10 Tr. 45:18-24] Counsel for the APA later conceded that the Association planned and organized the sick-out, knowing the job action was over an RLA minor dispute and thus illegal. [Apr. 12 Tr. 31:13-17]

2. Petitioners Defied The Restraining Order

The TRO required the named defendants and anyone working for or with them to take "all reasonable steps within their power" to prevent continuation or encouragement of the sick-out. The TRO also specifically required that petitioners: "instruct all pilots to resume their normal working schedule;" notify all APA-represented pilots by the "most expeditious means possible" of the contents and meaning of the TRO; include in the latter communication a directive "to cease and

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[5] Petitioners' repeated attacks on the district court for admitting post-TRO evidence of Petitioners' defiance of the TRO is a red herring. (Pet. 11-13) While the district court cited these corroborating e-mails in its findings of fact, they are not discussed here because they formed no basis for the court of appeals decision. The court of appeals noted that the three e-mails and LaVoy's Hotline message, all in the record at the time the TRO issued, coupled with the escalating sick-out numbers post-TRO, sufficiently evidenced Petitioner's contempt and thus mooted their due process complaints concerning the e-mails American subsequently obtained in discovery. *See* App. 15a and n.15.

desist" the sick-out; post the communication on the APA's web site; include the contents of the TRO ordering paragraphs in all telephone hotlines APA operated; report to the district court by noon on February 12, 1999 the methods used to effect the notice required by the TRO; and furnish copies of the notice and reports to American. (Pet. App. 29a-30a)

Petitioners fully participated in drafting the TRO and agreed to its form. Unaware of their premeditated strategy of defiance, at the February 10, 1999 session Judge Kendall stated, "I am trusting as a man of honor Captain LaVoy's representation to me that his pilots are going to do whatever I order." [Feb. 10 Tr. 89:13-15] The district court then concluded the hearing by stating: "Y'all need to get those airplanes flying quickly. Okay?" [Feb. 10 Tr. 89:23]

In response to the TRO, the APA posted a notice on its web-site and recorded a message for the Hotline (the "February 10 Communications") at 7:30 p.m. on February 10, 1999, stating that the TRO applied only to the APA and its Officers and Directors:

> This is Rich LaVoy with the APA Information Hotline for Wednesday, February 10. The time is approximately 7:30 P.M. Central. Early this afternoon in Dallas, U.S. District Court Judge Joe Kendall issued a Temporary Restraining Order ***enjoining APA from "concerted action."*** The Judge's action was in response to a filing by AMR management. Our attorneys are now reviewing this document. It is important to bear in mind that this order does not constitute a judgment on the merits of the contractual dispute and should have no effect on either side's bargaining position. Also, ***please be aware that where the court order refers to "defendant," it is referring to APA's National Officers, Board of Directors, Negotiating Committee, and General Counsel.***
>
> * * *

> Today's ***legal maneuvering*** by management does not bring us any closer to our goal of a negotiated settlement.

(R. 728 (emphasis added))

LaVoy recorded another Hotline and posted a second website message at 2:00 p.m. on February 11, 1999 (the "February 11 Communications") identical to the February 10 Communications, except for deletion of the statement that the TRO applied only to the APA, National Officers, and Board of Directors. The February 11 Communications still stated the TRO did not "constitute a judgment on the merits of the . . . dispute" and continued to describe the TRO as "legal maneuvering by management." [Feb 12 Tr. at 209 (Exh. B to Defs.' Exhibit 3 in contempt hearing)]

Petitioners represent the February 11 Communications as a "full TRO notice/return-to-work directive" and insist that they complied with the TRO.[6] (Pet. 6) Petitioners did not, however, reverse any of the affirmative steps they had taken to instigate the sick-out: they did not send any blast e-mails; they did not activate the phone tree; they did not retract their instructions to defy any injunction.

The pilots could decipher the code: "ignore the TRO." As APA intended, the sick-out continued; in fact, the pilot sick list increased. Compared to February 10, 1999—the date the TRO issued—when there were 2,295 pilots on the sick list and American cancelled 1,011 flights, on February 11, 1999, the number of "sick" pilots rose to 2,472 and American had to cancel 1,181 flights.

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[6] The court of appeals rejected this argument, finding "the return-to-work directives [were] 'so lacking in authoritative forcefulness that they either were not heard at all . . . or were discounted as being merely stage lines parroted for the benefit of some later judicial review.'" (Pet. App. 14a (quoting *United States Steel Corp. v. United Mine Workers of Am., Dist. 20*, 598 F.2d 363, 366 (5th Cir. 1979)).

3. The Petitioners Quickly Ended The Sick-Out When A Contempt Finding Was Imminent

Faced with the meltdown of its flight schedule, mounting and sizeable financial losses, and irreparable harm to its customer relations, American sought and obtained a Show Cause Order on February 11, 1999. By the close of the full-day February 12 Show Cause hearing, petitioners' contempt was apparent. The district court recessed until Saturday, February 13 when it would deliver its ruling.

No doubt realizing that the undisputed evidence warranted a contempt finding, petitioners finally abandoned their "wink-and-a-nod" posture and complied with the TRO. On February 12 at 8:00 p.m., LaVoy issued his first meaningful Hotline message, web-site posting, and blast e-mail, all of which could have and should have been issued two days earlier:

> I want to make a **personal plea** to all of our pilots: the Association's leadership needs your help in complying with Judge Joe Kendall's Order. We need to get this airline back up and running at full capacity, and we need to do so quickly. Please **clear the sick list immediately** and resume your normal schedule. Again, APA is absolutely serious about doing all we can to comply with the Judge's Order, and APA's entire leadership is asking for your help in doing so.

(Pet. App. 72a (emphasis added))

The petitioners followed up that night with another back-to-work plea signed by the entire Board and National Officers:

> February 12, 1999 8:45:23 P.M.
>
> Fellow Pilots:
>
> The AP National Officers and Board of Directors are making our best effort to comply with the Temporary Restraining Order issued by Judge Kendall on Wednesday afternoon. All of us in the APA leadership

> are making a **personal appeal** to our fellow pilots **to clear the sick list immediately** and to resume their normal schedule. **APA's entire leadership firmly believes it is in the best interest of the Allied Pilots to do our part to fully restore the American Airlines system. We need your help to do this and we need it now.**

(Pet. App. 73a (emphasis added))

The APA also, for the first time, utilized its full communications network to broadcast the back-to-work message, including: e-mailing 6,400 pilots; activating phone trees to telephone pilots; and convening a conference call to encourage each member of the APA Board of Directors and the APA Negotiating Committee to contact pilots in their domiciles. The APA Board once again led by example; nine of twelve Board members cleared the sick list on the evening of February 12. Rank-and-file pilots rapidly followed suit, and American's flight schedule quickly returned to normal.

On February 13, 1999, the district court held petitioners in contempt of the TRO for the two-day period of February 10 to February 12. The court found, based on extensive fact-finding, that the February 10 and 11 Communications were intentionally and foreseeably ineffective. It further concluded that, because of their earlier pre-conditioning of the rank-and-file, petitioners had failed to use their best efforts to attain compliance with the TRO. The district court concluded, as a matter of law, that the APA's violations of the TRO amounted to a ratification of the sick-out by the APA and held LaVoy and Mayhew jointly and severally liable with the APA for the resulting damage to American. The court of appeals rejected petitioners' challenges to the evidence supporting these rulings and affirmed each of them.

4. Petitioners' Contempt Caused Huge Financial Losses To American.

For two days, Defendants not only ignored, but actively defied, the TRO. This disregard for the court's order caused 2,279 flight cancellations that would not have occurred had the APA acted on February 10 as it finally acted on February 12.[7] Although American ultimately lost over $250 million because of the sick-out, it only sought compensation for the $50.96 million *directly caused by petitioners' two-day defiance of the TRO.*

Giving petitioners the "largest benefit of the doubt possible," the district court discounted American's damages calculation by 11% and found APA liable for $45.5 million in damages. The district court held LaVoy and Mayhew jointly and severally liable for the damage caused by their failure to use their best efforts to end the unlawful sick-out they organized and sustained. The court of appeals rejected petitioners' complaints that they did not receive enough discovery related to the contempt proceedings and affirmed the contempt finding and damages award in their entirety.

REASONS TO DENY THE PETITION

There is nothing remarkable about this case except the hubris of the Allied Pilots Association and the individual petitioners. Faced with paying for the consequences of a labor relations strategy that included, as central features, an illegal sick-out and premeditated contempt of a United States District Court's temporary restraining order, petitioners ask this Court to change one hundred years of precedent to immunize them from paying for the effects of their contempt in this case and to facilitate the future use of their lawless labor strategy.

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[7] The sick-out caused a total of 6,681 American flight cancellations from February 5 through February 16.

No aspect of this petition or the underlying litigation warrants this Court's review. The district court dealt fairly and even-handedly, in a manner consistent with the United States Constitution and the decisions of this Court, with the violation of the Railway Labor Act that necessitated the underlying lawsuit and with the petitioners' contempt of the district court's order to "take all reasonable steps within their power" to end it. No court of appeals has reached a contrary result in a compensatory, civil contempt case, and, thus, petitioners do not even assert any such conflict. Accordingly, the Court should deny the petition.

I. NEITHER UNSETTLED QUESTIONS OF LAW NOR FACTUAL EVIDENCE OF UNFAIRNESS SUPPORT CONSIDERATION OF THE QUESTION PRESENTED IN THE PETITION

There is no vacuum in the law concerning the process due in compensatory civil contempt proceedings. Moreover, the factual record does not support petitioners' characterization of (1) the nature of the underlying injunction, (2) the process the district court afforded to them in adjudging their contempt or in determining the consequent damages, or (3) the severity of the sanction, which simply compensated American for the direct damages of the contempt.

A. The Standard Of Procedural Due Process In Civil Contempt Proceedings Is Settled.

The district court's handling of the contempt proceedings in this case neither conflicted with this Court's precedent nor created a substantial federal or Constitutional question. The Fifth Circuit correctly affirmed, and petitioners do not contest, that petitioners' conduct during the 48-hour period following issuance of the district court's February 10, 1999 temporary restraining order constituted contempt of that order, and that the damages imposed were compensatory and

civil in nature.[8] (Pet. 14) Instead, petitioners seek to create a gap in the law of civil contempt where none exists and to achieve procedurally what the substantive law denies them—a free pass to disrupt the nation's transportation system to gain leverage in a labor dispute through defiance of a concededly proper court order.[9]

Procedural due process is not a technical concept with a fixed content. *See, e.g., Gilbert v. Homar*, 520 U.S. 924, 930 (1997); *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886, 895 (1961). Rather, it is flexible, requiring the courts to calibrate the procedural protections necessary according to the particular circumstances presented. *See Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). In *International Union, UMWA v. Bagwell*, the Court comprehensively reviewed the spectrum of procedural due process requirements arising in various types of civil and criminal contempt cases. 512 U.S. 821, 830-34 (1994) (balancing "necessity" of a speedy hearing against "potential for abuse").

At one end of the procedural due process spectrum—where summary action is justified—is immediate, direct, petty civil or criminal contempt where the necessity to uphold the power of the court clearly outweighs the danger of erroneous fact-finding or erroneous deprivation of life, liberty or property. *See, e.g., Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 820-21 (1987) (Scalia, J., concurring); *Codispoti v. Pennsylvania*, 418 U.S. 506, 513 (1974). At the other end is serious criminal contempt, whether direct or indirect, where full criminal procedural protections of right to counsel, jury trial and beyond a reasonable doubt burden of proof are required. In such a proceeding, the danger that factual error could result in serious criminal sanctions,

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[8] Petitioners do not seek review of the court of appeals' affirmation of the district court's findings of fact or conclusions of law.

[9] Petitioners stipulated in the district court that the pilots' concerted sick-out was illegal under the Railway Labor Act. *See* Pet. App. 3a n.6.

involving deprivation of life, liberty or property, clearly affects the necessity for swiftness. *See Bagwell*, 512 U.S. at 839; *Hicks v. Feiock*, 485 U.S. 624, 632 (1988); *Bloom v. Illinois*, 391 U.S. 194, 210 (1968).

Between the extremes of summary procedures on the one hand and a criminal jury trial on the other, due process requires exactly what the district court provided below before imposing a compensatory civil contempt sanction—notice of the alleged contumacious conduct and an opportunity to be heard in defense. *See Bagwell*, 512 U.S. at 833 (notice and hearing required for indirect civil contempt of orders to carry out "discrete, readily ascertainable acts"); *Taylor v. Hayes*, 418 U.S. 488, 498-99 (1974) (notice and hearing required for delayed adjudication of direct contempt); *Cooke v. United States*, 267 U.S. 517, 534-37 (1925) (notice and hearing required for indirect civil contempt).

The *Bagwell* decision imposed heightened procedural burdens only for a "discrete category" of "wide-spread, indirect contempts of complex injunctions through *noncompensatory* fines," which the Court found constituted *criminal*, not civil, contempt sanctions. 512 U.S. at 838-39 (expressly noting that its holding "leaves unaltered the *longstanding authority of judges to . . . enter broad compensatory awards* for all contempts through civil proceedings") (emphasis added). The courts have long recognized the soundness of vindicating private litigants' rights through compensatory relief in civil contempt proceedings, as a distinct remedy from civil coercive relief or criminal contempt sanctions. *See, e.g.*, Margit Livingston, *Disobedience and Contempt*, 75 Wash. L. Rev. 345, 349 (2000) (tracing historical developments in contempt power and noting that remedial civil contempt was an accepted category of contempt by the twentieth century).

If compensatory contempt is to achieve its goal to further the substantive law underlying the injunction, the procedural rules must be flexible and appropriate to the substantive law.

See Douglas Rendleman, *Compensatory Contempt: Plaintiff's Remedy When a Defendant Violates an Injunction*, 1980 U. Ill. L.F. 971, 973 (1980). In this case, the preeminent policy of the RLA to avoid disruption of the national transportation system justified the prompt, yet deliberate, action by the district court. By the time of the show cause hearing, the pilots' sick-out had inconvenienced over 450,000 passengers and caused the cancellation of 4,902 flights. [Feb. 12 Tr. 17:23-18:1; 19:10-24] American's flight operations, and its customers' patience, were approaching collapse. Moreover, the contempt was not "a completed act" as petitioners claim, but an *escalating campaign of self-help*. Petitioners' ongoing defiance, in response to a court order issued as a result of a direct violation of the Association's and the 1200 "sick" pilots' affirmative duty under Section 2 First of the RLA to avoid "any interruption to commerce or to the operations of any carrier growing out of any dispute between the carrier and [its] employees," justified the expedited, but far from summary, procedures in the district court. 45 U.S.C. § 152 First.

The potential for arbitrariness in this case was minimal because the TRO was clear, the required compliance steps were simple, and there was no factual dispute about what petitioners had done (and not done) to comply. Petitioners disputed only the district court's legal conclusion about the sufficiency of their conduct in light of the clear mandates in the TRO. This was not a case where final adjudication of contempt could be delayed until after the merits determination on the underlying injunction. *See Taylor v. Hayes*, 418 U.S. at 497-98 (discussing circumstances in which contempt determination may be properly postponed). The Association's defiance of the TRO was crippling the national transportation system.

Petitioners' attempt to analogize the simple back to work order to the "complex injunction" at issue in *Bagwell* simply

does not withstand scrutiny. There was nothing about the district court's TRO that would have involved the court in extended disputes between the parties or placed it a continuing supervisory role over them—the characteristics of "complex injunctions" that require heightened due process. *Bagwell*, 512 U.S. at 842 (Scalia, J., concurring in judgment). Nor can APA sustain the analogy of its continuing contempt to the "completed acts of disobedience" in *Bagwell*. (Pet. 20) The APA officers were intransigent at the February 12 hearing. The sick-out was escalating, more flights were cancelled for lack of pilots, twelve Board of Directors members were still on the sick list, and there was no plan to undertake the same affirmative communications to end the sick-out that were used to instigate it. APA's officers testified that they intended to continue their current course of conduct (and lack of effective action) unless ordered to do something different.

Petitioners argue that the district court had two choices on February 12 when faced with undisputed evidence of petitioners' premeditated contempt. It could have imposed coercive sanctions, providing the petitioners with a free pass for the first two days of premeditated contempt. Or, it could have let the contempt continue while the parties undertook discovery, motions, and a full trial on the merits, simultaneous with the underlying civil action for injunctive relief. This Court's jurisprudence has recognized for a century that civil contempt sanctions may be either coercive or compensatory, as required to enforce obedience to the court's orders. There are times, like this one, when civil contempt may only be remedied by "paying for what you break." Neither the choice of the appropriate remedy nor the size of the compensatory damages ties the lower court's hands

in taking timely action to adjudge and terminate premeditated defiance of its orders.[10]

Moreover, neither of these two alternatives would vindicate the preeminent purpose of the RLA, which is to avoid disruptions to the nation's transportation system. The "get out of jail free" approach of coercive civil contempt, in which the contemnor remains at liberty to disobey the injunction until a show cause hearing and, after a finding of contempt, the opportunity to purge without penalty, undermines the principles of the RLA. The stakes in the national transportation system are simply too high—as evidenced by the enormous financial losses caused by just the two days of the sick-out after the TRO and the serious inconvenience to 450,000 passengers. The courts below properly refused to adopt a process that can be "gamed" by the contemnor to allow a period of defiance of a court order without penalty.

Similarly deflating to the goal of Section 2 First of the RLA is erecting lengthy and unnecessary procedures in the path of compensatory civil contempt findings. This case demonstrated the power of compensatory contempt sanctions to quickly end civil contempt, and the underlying illegal work stoppage. Delaying the finding would sharply reduce the efficacy of the remedy, induce prolonged and greatly disruptive litigation, and increase the vulnerability of the nation's transportation system.

The self-serving approach APA urges would unnecessarily diminish the array of remedies available to courts to vindicate their orders and to promote the public interest in the restoration of vital transportation services.

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[10] "If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls the 'judicial power of the United States' would be a mere mockery." *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 450 (1911).

B. Petitioners' Characterization Belies The Facts And Process That Occurred Before The District Court

The district court struck the appropriate balance between "necessity" and "potential arbitrariness" in this case. While expeditious—in view of the public policy underlying Section 2 First of the RLA, the extent of the disruption to transportation, and the millions of dollars of damages American incurred every day the contempt continued—the procedures were not "summary" in nature. The TRO clearly set out, in specific affirmative terms, the conduct required of APA's officers and everyone acting in concert with them.[11]

When the sick-out escalated rather than abated following issuance of the TRO, American sought a show cause order, spelling out the basis for its charge of contempt by APA and its officers. American served the show cause motion, supporting affidavits and notice of hearing on APA by hand. American, which bore the burden of proving contempt of the TRO, operated under the same time constraints as the APA. APA and nine of the individual defendants appeared at the full-day show cause hearing, represented by counsel. Each testified and had the opportunity to present a defense. **The facts of the APA's conduct to comply with the TRO were uniquely in the possession of the defendants. The facts that formed the basis of the district court's contempt finding were not in dispute, and are not contested in this Court.** The district court considered the facts and prepared a detailed memorandum opinion before issuing the contempt

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[11] Once LaVoy decided to comply, he simply and effectively posted a notice on the APA web-site, recorded a Hotline message, convened his Board on a telephone conference call and instructed them to call off the sick-out. Within hours, more than half the pilots (and 9 of 12 Board members) cleared the sick list and flight operations quickly began to return to normal. These were the reasonable actions of a party acting in good faith to comply with a court order.

judgment. It deferred contempt findings with respect to absent defendants and held only LaVoy, Mayhew and the APA in civil contempt.

The damages portion of the contempt proceedings appropriately provided additional process. On February 17 the district court heard the direct and cross examination of American's two damages experts on the direct cost, in the form of lost revenue from cancelled flights, of the contempt. The court also admitted ten exhibits. The district court then granted APA's motion for a continuance and discovery, in part, by continuing the damages proceedings for two months (until April 12) and ordering document discovery on the damages issue. APA obtained voluminous business records, records that formed the basis of the opinions of American's expert witnesses. When the proceedings reconvened for two days of hearings in April, APA presented four defense witnesses, entered nine additional defense exhibits and reexamined American's experts.

Petitioners do not dispute the factual record (either of the contempt or the amount of the damages) and have never proffered a specific explanation of what additional procedures they should have had and how any procedures possibly would have affected the outcome.[12] APA's real quarrel is that they got caught red-handed in premeditated contempt of a TRO enjoining an illegal sick-out and have been made to pay the

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[12] Petitioners complain that the district court did not permit them to present testimony in the damages hearing from 273 individual pilots who would have testified that they were truly sick and did not call in sick at the instruction of petitioners. Because the evidence showed there were generally 300-400 pilots on the sick list at any time but, during the two-day contempt period the number of "sick" pilots averaged over 1,200, it cannot be argued seriously that the district court abused its discretion in rejecting the relevance of this testimony. Moreover, the Court of Appeals found that "defendants have not demonstrated how additional discovery would shed any significant amount of light on the issue [of damages]." (Pet. App. 21a)

considerable damages their illegal and contumacious conduct caused. Having lost their meritless challenge to the correctness of the district court's conclusion of law that their post-TRO conduct was "too little, too late," petitioners now seek to persuade this Court that they should have been permitted either to subject American and the traveling public to a prolonged sick-out while pursuing unnecessary discovery and a trial (possibly before a jury) or to have enjoyed a free pass for the first two days of their contempt. There is no support in the law for either alternative and both are hostile to the purpose of the RLA.

II. There Is No Basis To Apply The Maximum Procedures In The FRCP To An Ancillary Civil Contempt Proceeding Within A Civil Action

Due process does not require application of the full range of process in the Federal Rules of Civil Procedure to ancillary portions of a civil action. The contempt proceeding in this case was *ancillary* to American's complaint for preliminary and permanent injunctive relief to end the Association's illegal self help in a labor dispute subject to the RLA. *See Fox v. Capital Co.*, 299 U.S. 105, 107-08 (1936) (civil contempt is ancillary and may be appealed only as part of appeal from final judgment on underlying action); *see also Gompers*, 221 U.S. at 444-45 (contrasting criminal contempt proceedings, which are not treated as part of the original cause with civil contempt proceedings, which are).

The Federal Rules of Civil Procedure provide the district courts with flexibility and discretion to tailor the process due to the rights asserted and the relevant circumstances of the action. After assuring basic notice of the contempt allegations and the opportunity to be heard in defense—which petitioners unquestionably received in this case—the district court had broad discretion to set the scope and schedule of discovery and to conduct the hearing. *See In re: Sealed Case*

No. 98-3077, 151 F.3d 1059, 1068 (D.C. Cir. 1998) (noting that district courts have a wide degree of latitude in the oversight of discovery); *Laborers Int'l Union of North Am. v. U.S. Dept. of Justice*, 772 F.2d 919, 921 (D.C. Cir. 1984) (noting that control of discovery is a matter entrusted to the sound discretion of the courts).

Federal Rule 26, which governs discovery in a civil action, begins each relevant subpart with the words, "[e]xcept . . . to the extent otherwise . . . directed by order," Fed. R. Civ. P. 26(a), or "unless otherwise limited by order of the court," Fed. R. Civ. P. 26(b). Federal Rule 26 also permits the court to order that discovery be limited or not be had when it would be oppressive or pose an undue burden or expense. Most significantly, the Federal Rules limit the scope of discovery to "any matter . . . *that is relevant* to the claim or defense of any party," Fed. R. Civ. P. 26(b)(1) (emphasis added), and permit the court discretion to "act upon its own initiative" to limit the extent of discovery "otherwise permitted under these rules." Fed. R. Civ. P. 26(b)(2). The court has broad discretion to take into account the party's opportunity to obtain the information in other ways and the importance of the discovery in resolving the issues. *Id.* This language reflects the great deference accorded to a district court in managing discovery. Similarly, the Federal Rules leave to the sound discretion of the district court the decision whether to hear evidence on motions by affidavit or by oral testimony. Fed. R. Civ. P. 43(e).

This case exemplifies why the Federal Rules do not mandate a rigid menu of discovery selections in civil actions, much less in ancillary civil contempt proceedings. *See D. Patrick, Inc. v. Ford Motor Co.*, 8 F.3d 455, 459 (7th Cir. 1993). In *D. Patrick* the court of appeals held that full discovery was not required "[b]ecause the contempt proceeding is concerned solely with whether or not the respondent's conduct violates a prior court order." *Id.* The

court added that in contempt proceedings, "parties cannot reasonably expect to litigate to the same extent that it might in a new and independent civil action." *Id.* In the February 12 hearing, the only issue was whether the conduct of APA's officers complied with the terms of the January 10 TRO. The only "discovery" needed was for APA to ask its officers what they did to comply with the TRO and when. APA officers possessed first-hand information about, and copies of, all of the web-site postings, Hotline recordings and telephone watch scripts that they had prepared and disseminated. On the more fact-intensive issue of American's damages, the district court granted extensive document discovery and ample time for APA to review, analyze and rebut the damages data.

Petitioners' claim that the Federal Rules of Civil Procedure are the "benchmark for full civil due process" stands naked of any legal authority.[13] (Pet. 26-28) Without apparent regard for the widespread repercussions of their request on the federal district courts, they ask this Court to hear their case and to rewrite one hundred years of contempt jurisprudence

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[13] *Nelson v. Adams* certainly does not advance petitioners' argument. 529 U.S. 460, 120 S. Ct. 1579, 1584 (2000). In that case, the district court adjudged Mr. Nelson's liability on the basis of an amended pleading that was never filed with the court and never served on Mr. Nelson. The "swift passage from pleading to judgment" in that case occurred when the court *simultaneously* granted the motion to add Mr. Nelson as a party and entered judgment against him. *Id.* That was not, contrary to petitioners' assertion, the situation that occurred here, Pet. 26, when petitioners received service of the show cause motion and supporting affidavits, filed a pre-hearing Motion to Dissolve Show Cause Order and Memorandum Brief in Support, or Alternatively, Answer to Plaintiff's Motion for Contempt (R. 140-49), participated fully in a full-day hearing on contempt, obtained a continuance on the issue of compensatory damages, propounded discovery, received and analyzed over 12,000 pages of documents, examined under oath (not once but twice) American's damages experts and prepared and presented rebuttal damages testimony. This is more than the minimum process that is due under the Fifth Amendment.

to save them from their premeditated contumacy. The Court should reject that request.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

RICHARD A. MALAHOWSKI
AMERICAN AIRLINES, INC.,
Legal Department, MD 5675
P.O. Box 619616
D/FW Airport, Texas 75261-9616

HARRY A. RISSETTO
MORGAN, LEWIS & BOCKIUS LLP
1800 M Street, N.W.
Washington, D.C. 20036

DEE J. KELLY
Counsel of Record
DONALD E. HERRMANN
ROGER C. DISEKER
KELLY, HART & HALLMAN, P.C.
201 Main Street, Suite 2500
Fort Worth, Texas 76102
(817) 332-2500

Counsel for Respondent American Airlines, Inc.

January 22, 2001

APPENDIX

APPENDIX

Date: Fri, 5 Feb 1999 18:36:02-0600
Reply-To: APA Challenge & Response <C-R@ALLIEDPILOTS.ORG>
Sender: APA Challenge & Response < C-R@ALLIEDPILOTS.ORG>
From: Error! Bookmark not defined. <monesterio@954ACCESS.NET>
Subject: Error! Bookmark not defined
Content-Type: text/plain; charset=ISO-8859-1

....

Today, February 5, 1999, is "the line in the sand". This date was established by your APA Board on Saturday morning, January 30, 1999 during a lengthy conference call that revealed a lack of progress in negotiations. The Company was made aware of this date. APA negotiators attempted to deliver closure on these two seemingly simple items. The company was further informed that their resistance or inability to close on these items would be considered a continued violation of SCOPE and would not be tolerated beyond the end of this business day. Unfortunately, closure was not reached.

We can no longer ask you to withhold expressing your indignation at AMR's failure to respect your contractual rights. Each pilot should feel free to send whatever message, in any manner, that he/she feels necessary to express his/her displeasure. Hopefully, your resolute actions will bring this odious situation to an end.

Respectfully,

Captain Lloyd D. Hill, Miami APA Chairman F/O Bob Ames, Miami APA Vice Chairman

Date: Fri 5 Feb 1999 19:31:04-0600
Reply To: APA Challenge & Response
< C-R@ALLIEDPILOTS.ORG>
Sender: APA Challenge & Response
< C-R@ALLIEDPILOTS.ORG>
From: Terry McCarthy DFW/FO/S80/D 168466
#6068 <tmccarthy@NEWMILTEK.COM>
Subject: URGENT MESSAGE ABOUT SCOPE
Content-Type: text/plain, charset=ISO-8859-1
Today's E-Mail from Larry & Norm to All DFW Pilots:
February 5, 1999
To All Fellow Pilots:
AMR Management has refused to agree to a fair and equitable negotiated settlement of the Reno Air Scope violation. Meanwhile, they continue to control and operate Reno as a C-Scale airline. These jobs belong to us, the pilots on the American Airlines seniority list. It is certainly unfortunate that AMR management has moved so little on our concerns about Reno. They have refused to recognize December 23rd as the control date and have resolved none of the pay issues. They will not state, in writing, that they will not codeshare with Reno and they remain firm in their belief that they reserve the option to do so. Our proposal for a bid run, by seniority, for the Reno flying was flatly rejected.
There has been a great deal of stress associated with these actions by management. We are all feeling its ill effect and, in the absence of an adequate remedy, APA leadership is asking all pilots system-wide to consider whether they are 100% capable of performing their duties in the cockpit. Remember, self-assessment of your physical and mental well-being is your obligation under Federal Law. If you find yourself unable to perform your duties, you should consider your contractually available options - prior to your next scheduled trip
We remain committed to a negotiated settlement of this violation of Scope, the contractual cornerstone of our careers

at American Airlines. Your Union leadership needs your help to convince management of our collective resolve. Attached are some items and recommendations for your consideration.
Sincerely,
Captain Larry Foster Chairman
Captain Norm Patterson Vice Chairman

THINGS TO CONSIDER

It is possible that management will file an injunction against APA. That does not mean that you must fly if you are "sick." If you are sick, contact Crew Schedule immediately and let them know.
You are not required to state the nature of your illness. If you are having trouble contacting crew schedule follow this procedure:
Call 1-800-VIP CREW twice and let the phone ring each time until you are certain that it is not going to be answered. Log the times you called.
Repeat the above procedure, call 817-956-CREW. Log the times you called.
Call the emergency number, 817-967-7800. Log the time you called.
Also try 817-967-7849. Log the time you called.
If you are familiar with the procedure, use HISEND in PCFOS.
Once you are on the sick list, you are under NO obligation to answer your phone or, in any way explain yourself. If you happen to answer your phone and it is the flight office, politely tell them that you are sick and that any further discussion will take place with union representation once you are well.
Sick is defined by Webster as:
sick: a) affected by disease b) spiritually unsound c) sickened by strong emotion d) depressed e) lacking vigor
Do you meet this definition? If so avail yourself of your negotiated rights.

Tom Cook, president of SABRE's Technology Solutions division, said what the airlines won't say when he told an IATA gathering of airline financial executives:
"Everyone in this room would like to outsource their pilots."

Date: Fri, 5 Feb 1999 18:07:33-0600
Reply To: APA Challenge & Response
< C-R@ALLIEDPILOTS.ORG>
Sender: APA Challenge & Response
< C-R@ALLIEDPILOTS.ORG>
From: error! Bookmark not defined.
Subject: Lax Hotline Friday-Two thumbs :-(
Content-Type: text/plain, charset=ISO-8859-1
LAX Hotline Friday February 5, 1999
Ladies and gentlemen I am very sorry to say that as of 5pm today, CST your APA negotiators were unable to reach an agreement with management concerning a remedy for the scope control violation of 12/23/98. Additionally there was no commitment from management not to codeshare on Reno Air
There was some movement on other merger issues such as integration timelines, pay, fences and benefits but AMR refused to address the core issues critical to APA's pilots. Recall that what we needed were absolute commitment to our core issues:
* That a commitment be made, in writing, that management will not codeshare with Reno without an exception from APA to the scope clause or an acceptable integration agreement; and
* That management commit to the Green book economic remedy proposed by APA retroactive to the 12/13/98 control date.
The failure of negotiations today is extremely disappointing and represents a low point in the roller-coaster of emotions our pilots have withstood while waiting for AMR to both recognize ownership of the control violation, and agreement

for economic compensation retroactive to the control date of December 23rd.

I know this news is devastating to many whom had hoped management would take seriously, how important these core issues are. It shows disrespect for your contract, disrespect for your contribution, and disrespect for your character.

Additionally American has shut down Trip Trade with Open Time in direct violation of our contract. Because of this unilateral act we suggest that you discontinue use of TTOT overtime and makeup flying.

Fellow pilots, we understand your emotion on these issues and are deeply concerned. As airline pilots we have a public trust to consider. There has been a great deal of stress associated with the blatant contract violations for which there has not been adequate remedy. APA leadership has received numerous reports of pilots possibly flying while less than 100% focused on the operation.

This is the time of year when colds, flu and viruses abound. In addition to the normal health concerns, the stress and distraction due to our current contract dispute appears to be taking its toll. As an organization dedicated to safety, we cannot tolerate any degradation of safety within our cockpits.

APA leadership is asking pilots, SYSTEM-WIDE, to assess whether they are at 100% capactity to perform their professional duties in the cockpit. If you find yourself unable to perform your duties at 100% you should consider calling in sick. Your FAA Medical Certificate states clearly that you "shall not act as pilot in command, or in any other capacity as a required pilot flight crewmember, while that person knows or had reason to know of any medical condition that would make the person unable to meet the requirements for the medical certificate necessary for the pilot operation." (FAR61.53(a)).

Sick is defined by Miriam-Webster as:

1: affected with disease or ill health . . . 2: spiritually or morally unsound or corrupt . . . 3: sickened by strong emotion . . . 4: mentally or emotionally unsound or disordered . . . 5: lacking vigor . . . If you are affected by any of these symptoms, you may not be 100% and may be legally prohibited from exercising the privileges of your FAA Medical Certificate. NO one should feel intimidated about using their legal, negotiated sick leave benefits, especially when the consequences of violating FAR 61.53 are so potentially severe.

We are very concerned that our pilots will be "mission hackers" and fly when they should not. Captains, please make every effort to ensure that your crew is not emotionally distracted in any way. Please don't engage in discussion in the cockpit that could cause a safety hazard.

If you decide that you are unfit to fly your next trip, and MOST pilots probably are, then you should contact crew schedule immediately to let them know you are SICK. You are not required to state the nature of your illness, and do not allow yourself to be dragged into a discussion about it. Log and document your calls to crew schedule or use HISEND if you must and keep a hard copy.

Pull up an HI-1 for you records Once you are on the sick list you are under no contractual obligation to answer your phone. In the event the flight office calls, politely tell them that you are sick and any further discussion will take place with APA Union representation when you are well. Our intention is to vigorously defend any pilots' right to use their sick leave appropriately. It is possible that a Federal Judge will enjoin the APA from an alleged illegal job action. If that happens it does NOT mean that you, as an individual, may return to work if you still feel too stressed to perform safely in the cockpit. Remember the FAA has given YOU the final determination whether or not you are fit for flying duty.

Fellow LAX pilots, we are asking that each of you assist in spreading the word. When you receive this message, please consult your hard-copy Domicile Roster and make an effort to personally speak to at least three pilots above and below you. If they don't have e-mail, read them this message. This will insure that the word quickly gets out to all our members, and that no one is standing alone. The Domicile Telephone Committee will be looking for help. If contacted, please assist. It is a small investment for our contract and our careers.

Your LAX reps, along with the rest of APA leadership, deeply regret this turn of events and appreciate your support of the Association throughout this difficult and frustrating period. Together we will prevail and achieve the objectives that were agreed to in our contract with AMR management.

Captain Denny Breslin Chairman LAX